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NO. 82-850

in the

Supreme Court

of the

United States

October Term, 1982

EDWIN F. GORDON,

Petitioner,

vs.

GEORGE A. TERRY, SR., et al.,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF GEORGE M. BARLEY, JR., RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit Court of Appeals' affirmance of entry of a summary judgment in favor of George M. Barley, Jr. involves special and important reasons for certiorari review within the meaning and intent of Rule 17 of this Court.

LIST OF ALL PARTIES

Respondent Barley accepts petitioner Gordon's list of parties to the proceeding in the Court whose judgment is sought to be reviewed.

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REPORTS OF OPINIONS BELOW

The subject opinion of the Eleventh Circuit Court of Appeals is reported at 684 F.2d 736 (11th Cir. 1982).

Relevant opinions of the United States District Court, Southern District of Florida, are not reported but are contained in Petitioner's Appendix, Part "B", at pp. 1b-62b.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). It is respondent Barley's position, however, that this Court's jurisdiction has not been properly invoked since petitioner's Writ of Certiorari fails to fulfill the requirements of Rule 17 of the revised rules of this Court.

STATUTES AND RULES INVOLVED

Securities Act of 1933, 12(1), 17(a), 15 U.S.C. 77l(1), 77q(a); Securities Exchange Act of 1934, §10(b), 15 U.S.C. §78j; Rule 10 b-5 of the United States Securities and Exchange Commission. Such statutes and rule are set forth in parts H-K of Petitioner's Appendix. Rule 17, Revised Rules of the United States Supreme Court, 28 U.S.C.A.

STATEMENT OF THE CASE

Course of Proceedings Below

The material facts relating to the course of the instant case are succinctly and accurately set forth in the "Procedural History" contained in an Order of Dismissal entered by the United States District Court for the Southern District of Florida and in the subject opinion of the Eleventh Circuit Court of Appeals, copies

of which are located at pages 2b through 11b of petitioner Gordon's Appendix "B" and pages 3a through 8a of petitioner Gordon's Appendix "A" before this Court.

As indicated in the District Court's Procedural History:

> . . . The plaintiff, Edwin F. Gordon, first filed his complaints in the Southern District of New York in March and April of 1976. The cases were transferred to the Sothern [sic] District of Florida . . ."
>
> * * *
>
> The complaints as originally drafted were virtually incomprehensible but the [District] Court . . . nevertheless endeavored to ascertain their meaning. The Court, unable to decipher the language of . . . various written documents, set the cases for a hearing in September of 1976 in order to allow the plaintiff an opportunity to explain what he was attempting to assert in the various complaints. Immediately prior to the hearing the plaintiff filed yet another amendment to the amended complaints.
>
> At the hearing, at which plaintiff and his counsel responded frankly to certain questions regarding the subject matter of the complaints, the Court concluded that the plaintiff had failed to allege that a security was involved and, as a result, the Court was without jurisdiction. . . .

On appeal, the Fifth Circuit declined to decide the securities issue. Instead, the appellate court took a brief look at the voluminous pleadings and concluded that the plaintiff had failed to comply with Rules 8(a) and 8(e), requiring a short concise statement of the facts supporting a claim for relief. The Fifth Circuit vacated [the District] Court's previous Order and remanded the cases for re-pleading. [Gordon v. Green, 602 F.2d 743 (5th Cir. 1979)].

* * *

[Subsequent to] the remand the plaintiff . . . filed three sets of amended complaints. The first set of amended complaints, though shorter and clearer than the original pleadings, suffered from many of the same deficiencies. The amended complaints were largely conclusory and failed to state the factual basis for the plaintiff's claims. The plaintiff then filed his 'Second Amended Complaints' and, before the Court ruled on the sufficiency of those complaints, his 'Third Amended Complaint.'

At this point several of the defendants [including respondent Barley], growing impatient with the seemingly infinite number of amended complaints, called for summary judgment.

The plaintiff requested a continuance in order to prepare a reply to the various motions for summary judgment. The Court granted the continuance and set the cases for a hearing.

> The hearing was to be limited to the issue of whether a security is involved. The plaintiff was given a month and a half in which to depose the principal defendants for purposes of eliciting facts in support of his theory that what he purchased was a security. As a result of various scheduling conflicts, plaintiff claims that he was unable to conduct the depositions. Instead of requesting a continuance, however, the plaintiff waited until approximately a week before the scheduled hearing and then sought to cancel the hearing. In his motion to cancel the plaintiff also asked the Court to recuse. . . . The plaintiff's motion for recusal was wholly without merit and was denied. . . .
>
> The Court granted the plaintiff's motion to cancel the hearing and notified the parties that the summary judgement motions would be decided without benefit of a hearing. Shortly thereafter the plaintiff . . . requested oral argument on the pending summary judgment motions.
>
> At this point, the Court was somewhat perplexed by the plaintiff's vacillating requests but nevertheless reset the cases for oral argument. (Petitioner Gordon's Appendix "B" at 2b-10b.)

After oral argument, the District Court granted summary judgments to the defendants, including respondent Barley, and held:

> After this long convoluted history the Court is in essentially the same position in which it

found itself four years ago. The complaints are better drafted but the claims are essentially the same. Despite the plaintiff's numerous factual allegations and legal memoranda, the Court is compelled to reach the same conclusion reached in September of 1976: There is no security alleged; the claims based on the federal securities laws must be dismissed and; assertion of pendent jurisdiction over the remaining claims is not appropriate. (Petitioner's Appendix "B" at 11b.)

Petitioner Gordon appealed from the District Court's dismissal of his claims and the Eleventh Circuit Court of Appeals affirmed the District Court's granting of summary judgments in favor of all defendants except defendant E. G. Green. *Gordon v. Terry*, 684 F.2d 736 (11th Cir. 1982), Petitioner's Appendix "A".

Statement of Material Facts

Petitioner Gordon's suits relate to his investing in five different real estate ventures between March 23, 1971 and June 20, 1973, pursuant to five separate written investment agreements (petitioner's Appendix "A" at 11a-14a).

The objective of all of the ventures entered into by Gordon was to purchase undeveloped tracts of land and to hold the same until they could be re-sold at a higher price (petitioner's Appendix "A" at 11a).

The opinion of the Eleventh Circuit Court of Appeals which is the subject of the instant certiorari proceedings

concisely sets forth the nature of the particular partnership venture in which respondent Barley is involved, as well as the other four real estate ventures participated in by Gordon (petitioner's Appendix "A" at pp. 11a-14a, 20a-21a, 28a-32a, 34a-35a). In affirming the entry of a summary judgment in favor of respondent Barley, the circuit court stated and held:

> ". . .[T]he allegations and claims against . . . defendants [other than E. G. Green] are far from sufficient to raise a factual question.
>
> Regarding the [First National Bank of Palm Beach], Broberg and Barley, Gordon's assertions demonstrate that the Bank and Broberg had confidence in Green's expertise, that they assured Gordon his investments were in good hands, and that they claimed to be skilled in their respective occupations. Last, we are told that all three defendants agreed to manage the syndications. (Petitioner's Appendix "A" at 34a-35a).

ARGUMENT

THE ELEVENTH CIRCUIT COURT OF APPEALS' AFFIRMANCE OF ENTRY OF A SUMMARY JUDGMENT IN FAVOR OF GEORGE M. BARLEY, JR. INVOLVES NO SPECIAL AND IMPORTANT REASONS FOR CERTIORARI REVIEW WITHIN THE MEANING AND INTENT OF RULE 17 OF THIS COURT.

Certiorari should not be granted in the instant case because it does not meet the criteria set forth in Rule 17 of this Court pertaining to certiorari jurisdiction. No "special and important reasons" exist for this Court to issue a writ of certiorari herein within the meaning of such Rule with respect to respondent Barley. The Eleventh Circuit's decision below does not involve a conflict with any decision of another federal court of appeals or a departure from the accepted and usual course of judicial proceedings. No important question of federal law has been decided below and no conflict exists with any applicable decisions of this Court.

Petitioner Gordon's characterization of the questions presented for review distorts the opinion of the Eleventh Circuit as it relates to this respondent in an improper attempt to invoke the jurisdiction of this Court upon purported conflicts with decisions of this Court or other courts of appeal. In actuality, no such conflict exists.

Contrary to the position taken in petitioner's certiorari brief, the Eleventh Circuit did not hold that there can be no liability for "participating, aiding and abetting, or conspiring in violations of the Federal Securities Acts."

Instead, that Court merely held that petitioner Gordon has asserted nothing against any respondents which is relevant to viable legal theories under the federal securities laws, with the exception of defendant E. G. Green, the promoter of the five real estate ventures involved herein. More particularly, with respect to respondent Barley, it properly determined that Gordon's whimsical assertions merely indicate that Barley agreed to manage one of the five real estate syndications involved, and that such assertions are legally meaningless and insufficient to give rise to a cause of action against him when considered in the context of the written partnership agreement which was entered into by Gordon. The Court observed that the agreement undeniably gives Gordon the right to control all significant decisions relating to the partnership property. (Petitioner's Appendix at pp. 20a, 26a-27a). The Court thereupon correctly found that such allegations against respondent Barley were far from sufficient to raise material factual questions within the meaning of the summary judgment rule, Rule 56, Federal Rules of Civil Procedure and that Gordon's assertions pertaining to Barley were legally insufficient to establish a viable securities fraud claim against him. These determinations and findings were correct. In any event, they clearly do not give rise to "special and important reasons" for this Court's issuance of a writ of certiorari within the meaning of Rule 17.

In the interest of brevity, respondent Barley here refers the Court to and adopts the arguments and authorities contained in the Brief of Respondent First National Bank in Palm Beach in Opposition dated December 20, 1982, and the brief of Gustave T. Broberg, Jr. dated December 22, 1982 in the instant certiorari proceedings.

CONCLUSION

The Petition for Writ of Certiorari in the instant cause fails to properly invoke this Court's jurisdiction and, accordingly, should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to Rule 28.3, Revised Rules of the United States Supreme Court, three (3) copies of this brief were served upon each counsel of record, by depositing the same in a United States Post Office, with first-class postage prepaid, at the addresses shown below, on this 17th day of January, 1983.

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